IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.630 OF 2007
IN
NOTICE OF MOTION NO.2423 OF 2007
IN
L.C. SUIT NO.2619 OF 2007

1. Babar Sher Khan
2. Meraj Ali Shaikh
3. Mohammed Imtiaz Khan .. Appellants (Orig.Plaintiffs)

Versus

1. The Municipal Corporation of Brihanmumbai
2. The Maharashtra Housing & Area Development Authority .. Respondents (Orig. Defendants)

Adv.Mr.Navin Parekh alongwith Vidya Kamble i/b. Bilawala & Company for Appellants
Shri N.V.Walawalkar, Senior Counsel with Ms.Geeta Joglekar for the Respondent No.1-BMC
Shri Ravi Kadam, Advocate General with G.W. Mattos and Ms.Geeta Mulekar AGP for the Respondent No.2-MHADA

CORAM : S.R.SATHE,J.
DATED : 22/08/2007

ORAL ORAL :-

1. By consent heard finally at admission stage.

2. The Appellants-original Plaintiffs in Notice of Motion No.2423 of 2007 in L.C. Suit No.2619 of 2007 have preferred this appeal against the order passed by the Judge, City Civil Court, Mumbai whereby the Plaintiffs application for temporary injunction restraining the defendant No.1 Municipal Corporation of

Greater Mumbai (hereafter referred to as MMC) from demolishing Plaintiffs' suit structure till the disposal of the suit was dismissed. For the sake of convenience hereafter the parties shall be referred to as 'Plaintiffs' and 'MMC i.e. Mumbai Municipal Corporation' and 'MHADA i.e. Maharashtra Housing Area Development Authority'.

3. The brief facts giving rise to this appeal are as under:-

The land bearing Survey No.378(part) CTS No.43 (part) admeasuring 15858 sq.meters situated at Bandra-Kurla Complex, Mumbai was owned by defendant No.2 MHADA. They constructed in all 21 buildings consisting of 496 tenements and allotted the same to various allottees including Plaintiffs. The entire property was then transferred to seven Co-operative Housing Societies which Societies were then amalgamated in one Co-operative Housing Society named as Tata Colony Co-operative Housing Society Ltd.

4. In the year 1994, various allottees carried out additional development around or in front of their tenements without seeking permission from MHADA or from MMC. When this was noticed in 1994, MHADA issued notice

to them. The allottees then applied to MHADA for regularization of the said development. It was noticed by MHADA that occupants of the said additional construction were in fact not authorized to hold the said additional structure. It was noticed that the Plaintiff Babar Sher Khan had started tailoring business in the gala constructed unauthorizedly in place which was in fact required to be kept open compulsorily. MHADA, however, granted permission to carry out the said business in the said gala and informed the Plaintiff that it would be his responsibility to seek necessary permission from MMC.

5. When Bandra-Kurla Complex was declared as commercial hub by the State of Maharashtra M/s. M.K. Enterprises forwarded proposal of re-development of buildings situated on above mentioned land and the said company assured to provide permanent alternative accommodation as well as transit accommodation to the tenement holders of the above mentioned 21 buildings and obtained signatures of the tenement holders on some documents. Not only that but about 300 members or the tenement holders surrendered their right in their respective tenements to M/s. M.K. Enterprises. However, about 100 tenement holders did not surrender their

rights. Plaintiffs are few of them and they have filed the present suit in the representative capacity of those 100 members. It is alleged that M.K. Enterprises, therefore, started lodging false complaint against the said tenement holders including Plaintiffs. Not only that but the M/s. M.K. Enterprises and/or M.K. Malls & Developers Private Limited who took property from M.K. Enterprises induced MMC to issue notice under section 55 of the Maharashtra Regional and Town Planning Act, 1966 (hereinafter referred to as MRTP Act). Accordingly, the defendant No.1 MMC issued notice to several tenement holders including Plaintiffs on 20/06/2007 and called upon them to remove the unauthorized development of temporary nature carried out by them in the suit land. On receipt of the said notice, the Plaintiffs gave reply dated 23/06/2007 to the Assistant Municipal Commissioner, MMC and contended that the additional structure erected by them is not unauthorized and on the contrary, the same has been regularized by MHADA and the Plaintiffs and other tenement holders have even paid necessary charges for the same to MHADA. Not only that but they have also paid municipal taxes for the said period. According to them, the notice issued by MMC under section-55 of the Maharashtra Regional and Town Planning Act, 1966 was

illegal. Hence, Plaintiffs filed L.C. Suit No.2619 of 2007 against MMC and MHADA for declaration that the notice issued under section 55 of MRTP Act by defendant No.1 is illegal and for permanent injunction restraining the defendant No.1 MMC from taking any action on the said notice.

6. On the date of filing of the suit, Plaintiffs also filed Notice of Motion and prayed for temporary injunction. Junior Engineer of defendant No.1 MMC filed affidavit in reply and denied all the allegations made by the Plaintiffs. Firstly, he contended that suit is not maintainable in view of bar under section 149 of MRTP Act. According to him, Plaintiffs have admittedly not obtained necessary permission for putting up the additional unauthorized construction. It was also contended that MHADA had no authority to regularize the unauthorized construction but MHADA simply regularized change of name in its record from original allottees to the transferees and that too in respect of the tenements. The defendant No.1, therefore, contended that even if MHADA has recovered charges or compensation from the Plaintiffs that would not make any difference and it would not amount to MMC having accepting the structure in question as legal one. The

defendant-MMC, therefore, contended that as the structure in question was unauthorized and carried out on a land which was compulsorily required to be kept open, defendant has got every right to issue notice under section-55 of the MRTP Act and take further necessary action. The defendant, therefore, prayed for the dismissal of the Notice of Motion.

7. The Estate Manager of MHADA filed affidavit and took the contention that the suit is bad in view of the provisions of Section-173 and 177 of MHADA Act. He, further contended that the payment of compensation by the Plaintiffs for the use of structure would not create any right in their favour and the same is not sufficient to legalize the structure which is unauthorized and made by making encroachment on the open space. Hence, MHADA also prayed for the dismissal of the Notice of Motion.

8. After hearing arguments advanced by both the learned Advocates learned Trial Judge came to the conclusion that suit is barred under section 149 of MRTP Act. He also held that notice issued by MMC under section 55 of the MRTP Act is legal and valid and Plaintiff has failed to make out any prima facie case

for granting temporary injunction as prayed. He, therefore, dismissed the Notice of Motion.

9. Being aggrieved by the said order, Plaintiffs have filed the present appeal. In this appeal before me, Shri Navin Parekh learned Advocate for the Plaintiffs has urged 3 points. Firstly, he submitted that the notice issued by MMC under section 55 of the MRTP Act is illegal. According to him, if MMC had any grievance about the construction carried out by the Plaintiff, MMC should have given notice under section 53 of MRTP Act because according to him, notice under section 55 of the MRTP Act can be issued only when the alleged unauthorized structure is of a temporary nature. According to him, in the instant case, structure in question was of permanent nature and hence, notice is bad in law. Secondly, he canvassed before me that the structure in question is in existence since prior to 1994. Not only that but same has been regularized by MHADA. MHADA is accepting the occupation charges and as such, the construction in question can not be said to be illegal and unauthorized. Lastly, he submitted that Plaintiff has made out a prima facie case to show that the suit structure is legal and the notice under section-55 of

the MRTP Act is bad in law and if temporary injunction is not granted the Plaintiff would suffer irreparable loss. He, therefore, submitted that appeal be allowed and temporary injunction as prayed be granted. As against this, Shri Ravi Kadam, learned Advocate General for defendant No.2 MHADA supported the order passed by the Trial Court and submitted that in view of the provisions of Section 55(2) of the MRTP Act “decision of the Planning Authority on the question of what is development of a temporary nature is final and the same can not be challenged by filing suit as the same is not permitted by section-149 of the MRTP Act. He also canvassed before me that Plaintiffs have carried out the construction unauthorizedly around the original tenements and on a land which was in fact required to be kept open compulsorily. He also submitted that such unauthorized constructions are in fact creating great nuisance and hurdles in management of the property and providing basic civic amenities. He, therefore, submitted that appeal be dismissed. Similarly, Shri N.V.Walavalkar, learned Senior Counsel for the defendant No.1-MMC argued before me that notice issued by MMC under section-55 of the MRTP Act is legal and when the Plaintiffs have carried out unauthorized construction by making encroachment on the open land

the defendant-corporation is entitled to demolish such unauthorized construction and action taken by defendant No.l MMC is legal and correct. He also submitted that the Plaintiff has failed to make out any prima facie case and the balance of convenience is also not in favour of Plaintiff. He, therefore, submitted that the appeal be dismissed.

10. It is not in dispute that the land bearing Survey No.378(part) and CTS No.43(part) admeasuring 15858 was owned by MHADA and they constructed 21 buildings and the tenements thereon were allotted to different persons. Admittedly, initially seven Co-operative housing societies were formed and those societies were then amalgamated in one society i.e. Tata Colony Co-operative Housing Society Ltd. Admittedly, notice issued by MMC to Plaintiffs and other occupants is not in respect of the original tenements but it is in respect of the additional structure erected around or in front of the said tenement. It is true that the said structures are in existence since the year 1994. Not only that but it is also correct that MHADA has recovered charges for the said occupation from the occupants and they had issued letter regularizing transfer in the name of occupants.

If we see the letter issued by MHADA in this behalf which is dated 28/04/1994 then we find that by virtue of the said letter, MHADA had only permitted the Plaintiffs to use the unauthorized premises for carrying on business. They had nowhere stated that the construction carried out by occupants-Plaintiffs was legal. It is needless to say that competent authority for granting permission to carry out any construction was MMC and not MHADA. MHADA had in fact no authority to regularize the unauthorized construction. By no stretch of imagination, it can be said that by recovering the compensation and charges of occupation, MHADA had regularized the unauthorized construction of the structure in question. So, arguments advanced by the learned Advocate for the Plaintiffs that MHADA had regularized the construction can not be accepted.

11. The learned Advocate for the Plaintiffs strenuously argued before me that in the instant case, MMC ought to have issued notice under section 53 of the MRTP Act and not under section 55 of the MRTP Act. As notice is issued under section 55 of the MRTP Act, it would be worthwhile to see what the said section says:-

" S.55 Removal or discontinuance of unauthorized temporary development summarily :-

(1) Notwithstanding anything hereinbefore contained in this Chapter, where any person has carried out any development of a temporary nature unauthorizedly as indicated in sub-section (I) of section 52, the Planning Authority may by an order in writing direct that person or remove any structure or work erected, or discontinue the use of land made, unauthorizedly as aforesaid within fifteen days of the receipt of the order; and if thereafter, the person does not comply with the order within the said period, the Planning Authority may request the Distinct Magistrate or the Commissioner of Police, as the case may be, or authorize any of its officers or servants, to have such work summarily removed or such use summarily discontinued without any notice as directed in the order, and any

development unauthorizedly made again, shall be similarly removed or discontinued summarily without making any order as aforesaid.

(2) The decision of the Planning Authority on the question of what is development of a temporary nature shall be final."

12. Relying on the words "development of temporary nature", the learned Advocate for the Plaintiff submitted that in the instant case, the structure in question is not of tin sheets or tarpaulin but it is on the contrary made in bricks and cement and as such it is permanent structure. It can not be called as temporary structure and as such, Section-55 of the MRTP Act can not be made applicable to the structure in question. Firstly, it must be noted that the words used are "development of temporary nature". The word "development" is defined in Section 2(7) of MRTP Act. It runs as follows:-

" S.2(7) : "development" with its grammatical variations means the carrying out of buildings, engineering, mining or other operations in or over or under,

land or the making of any material change, in any building or land or in the use of any building or land {or any material or structural change in any heritage; building or its precinct} and includes {demolition of any existing building, structure or erection or part of such building, structure of erection; and}{reclamation,} redevelopment and lay-out and sub-division of any land; and "to develop" shall be construed accordingly."

13. If we carefully read Section-55 of the MRTP Act. It must be noted that it is stated therein that the Planning Authority may direct removal of any 'structure' or 'work erected'. These two words namely 'structure' and 'work erected' also indicate that in order to fall the structure under section-55, it must not be necessarily of wooden or tin sheets or tarpaulin. What is necessary to be seen is whether the development is of a temporary nature. If a structure is erected for a temporary or limited period then also it can be treated as development of temporary nature. In the instant case, when Plaintiff wanted to agitate that the construction in question or development in question

is not of a temporary nature, it was necessary for the Plaintiffs to bring on record some prima facie cogent evidence to show that it is development of permanent nature but we find that Plaintiffs have not adduced any such evidence. It is worth to note that even in the notice reply which Plaintiffs had given through Advocate they had not at all mentioned that the structure erected by them is not temporary and that it is permanent one. All that they had contended was that it was not unauthorized. If really development in question would not have been of temporary nature then normally such stand would have been taken by the Plaintiffs in the notice reply but that has not happened. Only in plaint, Plaintiff had mentioned that the structure is in bricks and cement but that by itself will not save the same from the application of the Section-55 of MRTP Act.

14. It must be noted that in the notice issued under section-55 of MRTP Act, the defendant No.1 MMC had specifically mentioned that after carrying out survey of the said property it is noticed that development of temporary nature was carried out unauthorizedly. Section-55(2) of the MRTP Act says :-

"S.55(2) : The decision of the Planning

Authority on the question of what is development of a temporary nature shall be final."

So, it is very clear that Planning authority's decision in this behalf that is whether a particular development is of a temporary nature or not is final. So, unless there is very cogent and convincing evidence to show specifically that development is of permanent nature, I am not inclined to accept the arguments of the learned Advocate for the Plaintiffs in this behalf.

15. A feeble attempt is made on behalf of the Plaintiffs to show that the defendant No.1 wanted to take hasty action and had no intention to give some breathing time to Plaintiff or to give them opportunity to put forward their case and that is why defendant No.1 instead of issuing notice under section 53 of the MRTP Act, issued notice under section 55 of the MRTP Act. However, there is nothing on record to substantiate this proposition. We can not ignore the fact that even after issuing notice under section-55 of the MRTP Act, a person who has carried out unauthorized construction is given an opportunity of 15 days to comply the notice. In the instant case,

occupants/Plaintiffs were made aware that in case defendant No.2 finds it necessary to have the space on which the structure is erected then Plaintiff would take away the same and would not make any grievance. So, it was clear that the Plaintiff should have obtained necessary permission from the Mumbai Municipal Corporation. So, these facts also indicate that development in question was not of permanent nature and was not to remain forever.

16. Plaintiffs have not placed on record any prima facie evidence to show that the structure in question was erected by obtaining necessary permission from the MMC. I have absolutely no hesitation to hold that the structure in question is unauthorized, illegal and carried out by making an encroachment on the open space which was in fact required to be kept open compulsorily. So, having regard to all these facts and circumstances, it is clear that notice issued by defendant No.1 under section 55 of the MRTP Act is legal and valid.

17. Once, it is held that notice issued by defendant was legal and valid, question arises whether Plaintiffs are justified in filing the present suit in

the City Civil Court, Mumbai or whether the said suit is barred under section-149 of MRTP Act. In order to decide this question properly, it would be worthwhile to see what section-149 says. It runs as follows :-

> ***"S.149. Finality of orders – Save as otherwise expressly provided in this Act, every order passed or direction issued by the State Government or order passed or notice issued by any Regional Board, Planning Authority or Development Authority under this Act shall be final and shall not be questioned in any suit or other legal proceeding."***

18. Shri Parekh, learned Advocate for the Plaintiff submitted that suit can not be held to be barred under section 149 of the MRTP Act because no alternative remedy is provided in the said Act. According to him, execution of jurisdiction can not be inferred unless the statute has provided adequate and efficacious alternative remedy. In order to support this proposition, he has placed reliance on a case **Dhruv Green Field Ltd. V/s. Hukam Singh and Others (2002) 6 SUPREME COURT CASES 416**. I have carefully gone through the said authority. However, the facts of the said case

and the facts of the case in hand are quite different. In fact in that very case, the Apex Court has laid down the principles which the Court has to follow while ascertaining whether Civil Courts Jurisdiction is excluded or not. The said principles are :-

> ***"(1) If there is express provision in any special Act barring the jurisdiction of a Civil Court to deal with matters specified thereunder the jurisdiction of an ordinary Civil Court shall stand excluded.***
>
> ***(2) If there is no express provision in the Act but an examination of the provisions contained therein leads to a conclusion in regard to exclusion of jurisdiction of a Civil Court, the Court would then inquire whether any adequate and efficacious alternative remedy is provided under the Act; if the answer is in the affirmative, it can safely be concluded that the jurisdiction of the Civil Court is barred. If, however, no such adequate and effective alternative remedy is provided then exclusion of the***

jurisdiction of the Civil Court can not be inferred.

(3) Even in cases where the jurisdiction of a Civil Court is barred expressly or impliedly, the Court would nonetheless retain its jurisdiction to entertain and adjudicate the suit provided the order complained of is a nullity."

19. As in Section-149 of MRTP Act, there is express bar for Civil Courts jurisdiction, the present case squarely falls under principle mentioned at serial No.1 and hence, I have no hesitation to hold that the above mentioned authority is in fact of no help to present Plaintiff. Incidently, it must be noted that in a case **Bales Sardara Paracha V/s. Municipal Corporation of Greater Bombay and another 2005(4) Bom.C.R.577**, this Court (Smt. Rajana Desai, J.) was considering the validity of a notice issued under section-55 of the MRTP Act and while considering the said issue which was raised by the Plaintiff the Court observed that the suit filed by the Plaintiff in City Civil Court for challenging the validity of notice issued under section-55 of the MRTP Act is barred as per the provision of Section-149 of the MRTP Act. Similar view

was also taken by this Court (Coram : Smt. Nishita Mhatre, J.) in a case **Mohan N. Bhawe V/s. Municipal Corporation of Greater Bombay 2005(3) BOM.C.R.300**. Thus, having regard to the facts of the present case and the position of law mentioned above, I have no hesitation to hold that the present suit is barred by section-149 of the MRTP Act and the finding recorded by the learned Trial Judge in that behalf is legal and correct.

20. It was tried to be argued on behalf of the Plaintiffs that though the construction in question was carried out prior to 1994, the defendants did not take any action till 2007. However, it must be noted that initially MHADA had taken action at least in respect of unauthorized occupation. So far as unauthorized construction is concerned when Plaintiffs noted the same, they have taken action. Merely because unauthorized construction remains in existence for a long time that would not convert the illegal unauthorized construction into a legal construction. While considering this aspect, the learned Senior Counsel appearing on behalf of the defendants brought to my notice that initially even under section 53 of the MRTP Act limitation prescribed for taking action

was 7 years but the said limitation has been removed and it shows the intention of the legislature that the construction which is unauthorized has to be demolished, no matter for what time it has remained in existence. So, there is no substance in the arguments advanced by the learned Advocate for the Plaintiffs in this behalf. Thus, if we take into consideration the pleadings of the parties, facts and circumstances of the cases and the position of law, it is very clear that Plaintiffs have failed to make out any prima facie case to show that the construction in question is legal or authorized or that the notice issued by defendant No.1 MMC under section-55 of the MRTP Act is not legal and valid. The Plaintiff has also miserably failed to prove that the balance of convenience is in favour of the Plaintiffs. In the instant case, if temporary injunction is granted in favour of Plaintiff then it would amount to putting premium on Plaintiff's wrong. In **Seema Arshad Zeheer and others V/s. Municipal Corporation of Greater Mumbai and others (2006) 5 Supreme Court Cases 282**, the Apex Court has observed

> ***"where the Plaintiffs do not make out a prima facie case for grant of an injunction and the documents produced clearly show that the structures are unauthorized, the***

Court may not grant a temporary injunction merely on the ground of sympathy or hardship. To grant a temporary injunction, where the structure is clearly unauthorized and the final order passed by the Commissioner (of the Corporation) after considering the entire material directing demolition, is not shown to suffer from any infirmity, would be to encourage and perpetuate an illegality."

So, having regard to above mentioned observations of the Apex Court also it must be said that Plaintiffs in the instant case are certainly not entitled to get temporary injunction as prayed. The learned Trial Judge has rightly dismissed the Notice of Motion. I do not find any reason to interfere with the said order. Hence, I pass the following order:-

O R D E R

The appeal is dismissed.

Under the circumstances of the case, parties to bear their own costs of this appeal.

At this stage, the learned Advocate for the Appellant submits that the above mentioned order be stayed for a period of about 4 weeks.

Hence, the above mentioned order is stayed for four weeks.

(S.R. SATHE,J.)